75-1759

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

EVELYN RENE JOHNSON, a minor aged ten years, by: MARLENE MILLER, *Petitioner*,

-vs-

C. TAYLOR WHITTIER, individually and as Kansas Commissioner of Education, KANSAS STATE BOARD OF EDUCATION, JOHN W. FRAZIER, PAUL J. JONES, DOROTHY BALLARD, DOROTHY G. GROESBECK, HAROLD H. CRIST, THOMAS J. PITNER, WILLIAM T. BILLINGSLEY, HARRY O. LYTLE, JR., CARL M. WILSON and ERVIN E. GRANT, each individually and as members of Kansas State Board of Education, BOARD OF EDUCATION OF TOPEKA UNIFIED SCHOOL DISTRICT 501, MARK L. MORRIS, JR., ROBERT R. SCHENDEL, GORDON SOMMERS, FRED W. RAUSCH, JR., CONSTANCE L. MENNINGER, HARRY W. CRAIG, JR., R. G. SWENSON, WAYNE T. STRATTON and, T.C. ANDERSON, et al, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRED W. PHELPS, ESQ.
3701 W. 12th Street
Topeka, Kansas 66604
913/273-1420

ARNOLD LEVIN, ESQ.
Rohm & Haas Building
6th & Market Streets
Philadelphia, PA 19106
215/923-8900

Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

TO: The Honorable, the Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Petitioner, Evelyn Rene Johnson, prays that a Writ of Certiorari be issued to review the judgment order of the United States Court of Appeals for the Tenth Circuit entered in the above case on March 8, 1976.

Opinions Below

The decision and order of the District Court for the District of Kansas is printed in Appendix "A" and is unreported. The opinion of the United States Court of Appeals for the Tenth Circuit entered on March 8, 1976, is printed in Appendix "B" hereto and is unreported.

Jurisdiction

The per curiam decree of the United States Court of Appeals, Tenth Circuit, upon which certiorari is sought, was dated and filed March 8, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether the denial of the certification of a class action brought under the Civil Rights Act for damages based on failure of defendant, Board of Education of Topeka, Kansas, and members of that School Board, to implement the mandate of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1954), is an appealable order in and of itself and/or in the alternative, whether said order sounds the death knell and is thus appealable.

Statutes Involved

The statutory provisions involved are Federal Rule of Civil Procedure No. 23, 28 U.S.C.A. page 289.

Statement of the Case

The named plaintiff in this action, Evelyn Rene Johnson, is a student in a predominantly black elementary school, which school is under the administrative jurisdiction of the School Board of Topeka, Kansas, and the Kansas State Board of Education. The defendant School Board and School Board members have been charged

by the decision in *Brown v. Board of Education of Topeka, supra*, with the obligation to take affirmative action to correct racial segregation and to provide comparable educational facilities in the student body population under their jurisdiction.

Plaintiff can prove that defendants have failed to correct past inequities and injustices in both school population and facilities.

The basis for federal jurisdiction of this action in the United States District Court for the District of Kansas was the Fourteenth Amendment of the United States Constitution, 42 U.S.C. §§1981, 1983 and 1985, and *Brown v. Board of Education of Topeka*, 349 U.S. 294 (May 17, 1954).

Plaintiff brought the present action pursuant to Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C.A., seeking certification of a class of all black children who are now or who have been students of elementary and junior high school in east Topeka and north Topeka, generally, and who have been systematically discriminated against by defendants acting as individuals and in conspiracy with each other.

Upon plaintiff's motion for certification pursuant to Federal Rule of Civil Procedure No. 23, the District Court in its opinion of October 9, 1975, denied certification.

On October 28, 1975, the District Court certified for review by the

Appellate Court the denial of the class action pursuant to 28 U.S.C. §1292(b). This request was denied by the Court of Appeals for the Tenth Circuit on December 16, 1975 in the case numbered 75-8107.

Plaintiff-Appellant simultaneously appealed the denial of the certification order as a "final order within the meaning of 28 U.S.C. §1291". Defendant-Appellee filed a motion to dismiss which was granted on March 8, 1976. It is from that order that this Petitioner seeks certiorari.

Reasons for the Allowance of the Writ

WHEREIN THE SUPREME COURT OF THE UNITED STATES HAS MANDATED A PLAN OF DESEGREGATION IN *BROWN v. BOARD OF EDUCATION OF TOPEKA*, 349 U.S. 294 (1954) AND SAID STUDENT SEEKS REDRESS BRINGING A CLASS ACTION PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, IS NOT THE DENIAL OF SAID CLASS ACTION A FINAL AND APPEALABLE ORDER AND/OR, IN THE ALTERNATIVE, DOES NOT THE DENIAL OF SAID ORDER SOUND THE DEATH KNELL OF SAID LITIGATION AND IS IT NOT THUS APPEALABLE.

In the instant action the District Court improperly denied certification under Federal Rule of Civil Procedure No. 23(b)(2) and 23(b)(3). The basis of the District Court's denial of certification as to 23(b)(2) was that two pending actions in the District Court

for the District of Kansas, *Unified School District No. 501 v. Weinberger*, No. 74-160-C5 and *Brown v. Board of Education*, Civil Action No. T-136 also sought injunctive relief. The District Court erred in that *Unified School District No. 501 v. Weinberger, supra*, was not a class action and was stayed pending a resolution of *Brown v. Board of Education, supra*. The *Brown* case has been inactive for twenty years and is presently inactive. Under the circumstances, only this Petitioner was pursuing the action.

The District Court also improperly ruled that plaintiff could not pay the costs of notice of approximately One Thousand ($1,000.00) Dollars and as such could not be a proper class representative.* At no time was this at issue in that plaintiff strenuously objected to interrogatories seeking the extent of plaintiff's financial resources. Answers to these interrogatories were never pressed by the defendants. Nevertheless, the District Court denied class action certification for this reason.

The financial status of the plaintiff is not relevant for class action certification. *Sanderson v. Winter*, 507 F.2d 477 (10th Cir. 1974); *Sayre v. Abraham Lincoln Federal Savings & Loan*, 65 F.R.D. 379 (E.D. Pa. 1974); see also, *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 931 (7th Cir. 1972).

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* Judge Templar has recently ruled *contra* this position, see Appendix "C".

The District Court also denied class action certification stating that there were difficulties in proving individual damages. Courts have traditionally held questions of liability to predominate over damages and have allowed class actions to proceed where there are in fact individual damages. *West Virginia v. Chas. Pfizer & Co.*, 333 F.Supp. 278 (1971); *Penn Central Securities Litigation*, 347 F.Supp. 1327 (E.D. Pa. 1972); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), cert. den. 394 U.S. 928 (1969).

The denial of class action certification for the above reasons is clearly not in keeping with the decisional law concerning the respective points.

The Court of Appeals for the Tenth Circuit, in dismissing plaintiff's appeal, on the basis that denial of class action certification is not a final order and thus is not appealable and, further, that the death knell has not sounded in this litigation because plaintiff has individually claimed Ten Thousand ($10,000.00) Dollars in compensatory damages and Ten Thousand ($10,000.00) Dollars in punitive damages, will deny relief not only to the class that plaintiff purports to represent, but to plaintiff herself as this litigation cannot proceed other than as a class action.

The costs involved in a civil rights action challenging the discriminatory practices of a school board are great, as extensive investigations and expert opinions are necessary and should be

considered in determining whether the dismissal of the class action constitutes a "death knell".

In addition to the mere dollar amount sought by the remaining representative plaintiff, *Gosa v. Securities Investment Company*, 449 F.2d 1330, 1332 (5th Cir. 1971), lists other factors to be considered in deciding whether the dismissal of the class action constitutes a "death knell":

> How much expense should reasonably be anticipated in carrying the cause to completion; whether the degree of solvency of the named party would assure at least the payment of court costs and basic litigation expense; the likelihood of recovery which would include attorney fees, either directly or on a contingent basis; or the potential amounts of the claims of other class members.

The order in the instant case denying class action certification is not "tentative or incomplete" and thus is within this Court's caveat expressed in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). This Court recently adopted the "collateral order doctrine" of *Cohen* in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1973).

Thus, in the instant action, there can be no doubt that the expenses involved in prosecuting this litigation

require class action certification before a proper undertaking can be made of this cause of action. As such, the "death knell" sounds when certification is denied. Adopting the "death knell" doctrine are *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143 (6th Cir. 1975); *Green v. Wolf Corp.*, 406 F.2d 291 (2nd Cir. 1968); and, *Gosa v. Securities Investment Company, supra.*

Although it is Petitioner's contention that the "death knell" has sounded in the instant litigation and an appeal should be allowed, Petitioner asks this Court to adopt a standard removing the arbitrariness of the "death knell" doctrine and allowing all class action certification denials to be reviewable as recently held by the Supreme Court of Pennsylvania in *Bell v. Beneficial Consumer Discount Company*, 348 A.2d 734 (1975). The Court, speaking through Justice Roberts, found the denial of class action status to pose such practical aspects of finality as to make it appealable. The *Bell* Court stated:

> Refusing to allow appeals here would undermine the basic objectives of the class action rule. The judicial process would not achieve the benefits of having matters affecting large numbers of people litigated expeditiously in a single action. By allowing appeals from orders denying class status, individuals with small but meritorious claims will not be turned away without recourse where the action should be

characterized as a class action but has not been so designated.

Appellee urges that to allow appeals from these orders will increase the workload in the already overburdened appellate courts. They remind us of the principles of judicial economy upon which the finality rule is based. We are mindful of the need to avoid piecemeal review but we are convinced that our decision today is faithful to those principles.

After a decision by a trial court that an action is not properly maintainable as a class action, an early determination by an appellate court that a matter is, or is not, a proper class action avoids repetitious litigation. Resolving the merits of a suit against a single defendant by a potentially large number of plaintiffs in one action 'serve[s] the interests both of judicial administration and of justice.' Moreover, this holding recognizes our basic duty to review those orders which end parties' participation in an action. Despite the contention that allowing appeals from these orders might, perhaps, increase the number of cases for appellate review, we believe, as does

> Professor Wright, that '[i]f better justice can be obtained by broadening the scope of appellate review, then even congestion, delay and expense are not too high a price to pay.' We do not perceive our appellate responsibilities as a variable function of our caseload. Appellate review at this juncture is a judicial duty which we may not abdicate by simply saying that we do so to avoid 'congestion, delay and expense.' (footnotes omitted)

Petitioner recognizes that a review on writ of certiorari is not a matter of right, but a matter of sound judicial discretion. However, this Court has enunciated in Rule 19 certain considerations governing review on certiorari which will be considered in deciding whether or not to grant the writ. At least two of those Rule 19 considerations are present herein, to wit: (1) The Tenth Circuit has in this case rendered a decision in conflict with that of the Second, Fifth and Sixth Circuits; (2) The Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

For these reasons, petitioner respectfully urges that this Court allow her writ of certiorari.

Conclusion

This Court is requested to review this matter in order to clarify the appealability of denials of class action certifications pursuant to Federal Rule of Civil Procedure No. 23. Petitioner urges this Court to allow denials to be appealable as a matter of right and, in the alternative, to allow a liberal application of the "death knell" doctrine.

ARNOLD LEVIN
Rohm & Haas Building
6th and Market Streets
Philadelphia, PA 19106
215/923-8900

FRED W. PHELPS
3701 W. 12th Street
Topeka, Kansas 66604
913/273-1420

Attorneys for Petitioner.

A P P E N D I X " A "

ORDER DENYING MOTION TO
CERTIFY CASE AS A CLASS ACTION
(Filed October 9, 1975)

Plaintiff, a minor, brings this action by her next friend against C. Taylor Whittier, individually and as Kansas Commissioner of Education, against the Kansas State Board of Education and its individual members, against the Board of Education of Topeka Unified School District No. 501, and its individual members, and Caspar Weinberger, individually and as Secretary of Health, Education and Welfare.

The action is described in plaintiff's complaint as a class action seeking actual and punitive damages and injunctive relief by reason of deprivation of civil rights.

Plaintiff alleges in substance that her class action is brought on behalf of all black children who are now or who have been students of elementary and junior high schools of East Topeka and North Topeka generally, and who have been systematically discriminated against by defendants acting as individuals and in conspiracy with each other and with others acting under color of state law both in their individual and official capacities, in that defendants at all times relevant hereto have provided the white school children in West Topeka and South Topeka generally with vastly superior educational facilities and opportunities, including buildings, equipment, libraries and facilities, together with those qualities which are incapable of objective measurement but which are of the essence of a good education; thereby maintaining and perpetuating *de facto* segregation in the field of public education in USD 501; and thereby generating in plaintiff and her class feelings of inferiority as to their status in the community, thus affecting their motivation to learn and generally affecting their hearts and minds in a way unlikely ever to be undone; and that in the doing of these things defendants have subjected plaintiff and her class to deprivation of rights and privileges secured to them by the Constitution and laws, and have conspired together and with others to do so; thus entitling plaintiff and her class to actual damages, punitive damages, declaratory relief and injunctive relief against defendants and each of them.

It is alleged in plaintiff's First Cause of Action that she is a student at Parkdale School in East Topeka within USD 501; that 90% of the students are black; that only 8% of the students in USD 501 are black; that the Parkdale School is antiquated and in a bad state of repair, its contents and equipment old and of inferior quality, the faculty relatively substandard and uninspired, and that the intangible qualities of advantageous social intercourse and opportunity to study with, engage in discussions and exchange ideas with white children who are providentially favored economically and socially are virtually nonexistent at said school.

It is further alleged that plaintiff is thus a victim of *de facto* segregation and is thus condemned by the unlawful conduct of defendants to receive her education in a racially segregated environment, and her education will have a value to her as a result of at least $10,000.00 lower than that of white children in USD 501 attending elementary and junior high schools in West Topeka and South Topeka generally.

Plaintiff further alleges that other schools in USD 501 have buildings and grounds of superior quality, are new, spacious and well kept, with equipment relatively new and of superior quality, and with faculties of high quality. It is alleged that the class which plaintiff purports to represent consists of all black children who are now and/or who within ten years past have been students in the public elementary and junior high schools of USD 501 in East Topeka and North Topeka; that plaintiff estimates that the class consists of at least 10,000 persons and that each member has sustained actual damages in the amount of at least $10,000.00.

Plaintiff also asks for punitive damages in the amount of $100,000,000.00 to be recovered and distributed to the members of the class in the approximate amount of $10,000.00 each. Plaintiffs also ask for costs and attorneys' fees.

Plaintiff, by her Second Cause of Action, asks for a declaratory judgment establishing her rights and those of her class, and for injunctive relief

by her Third Cause of Action.

The action has been dismissed as to the defendant Caspar Weinberger, Secretary of Health, Education and Welfare.

On September 20, 1975, a proceeding in the nature of a pretrial took place before Magistrate Robert H. Miller at which time plaintiff was directed to file a motion to determine the class and a motion for leave to file an amended complaint (Doc. 64).

Plaintiffs have filed a motion to determine the class (Doc. 67), but no amended complaint appears in the file, though plaintiff's motion seems to now include all black and "other minority children."

The motion to have the action determined as a class action under provisions of F.R.Civ.P. 23 states:

"1. The class of plaintiffs consists of all black and other minority children who are now and/or who during the past ten years have been students of elementary and junior high schools of USD 501 with minority enrollment of 40% of more.

"2. The class of plaintiffs is so numerous that joinder of all members is impracticable.

"3. There are questions of law and fact common to all members of the class of plaintiffs, to wit: (a) the violation of the Federal statutes and the decisional law of the Federal Courts; (b) the conspiracy of the defendants to

accomplish the same; (c) the inferior education rendered the class of plaintiffs with regard to inferior facilities, teachers, educational plan, curricula, etc.; (d) the damages sustained by the class of plaintiffs as a result of said inferior education; (e) the school discrimination fostered by defendants' conduct; (f) whether defendants acted under color of state law; (g) the comparison of the education of white school children with that provided the class of plaintiffs; (h) the perpetuation of de facto segregation in the field of public education; (i) the diminution of earning power of the class of plaintiffs as a result of such conduct; (k) such other items as will be discovered by discovery.

"4. The claims of the representative plaintiffs are typical of the claims of the class of plaintiffs.

"5. The representative plaintiffs will fairly and adequately protect the interest of the class by plaintiffs.

"6. The prosecution of separate actions by the named plaintiffs or other individual members of the plaintiff class would create a risk of adjudication with respect to individual members of the plaintiff class which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

"7. Defendants have acted on grounds generally applicable to representative

and class plaintiffs, thereby making appropriate final injunctive relief with respect to the defendants.

"8. The questions of law or fact common to the members of the plaintiff class, paragraph 3 supra, predominate over any question affecting individual members, and class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Answers have been filed by several defendants. Motions to dismiss and for summary judgment are likewise pending and have been submitted for the Court's consideration. The order of the Magistrate (Doc. 64) provided, among other things, that discovery on merits shall be stayed until the Court has ruled on the motion and determined the class, that discovery on the class action question be extended to January 20, 1975, and that briefs should be filed within designated dates.

Plaintiff's motion to determine the case to be a class action came on for hearing July 18, 1975. Following the hearing, counsel requested leave to file additional briefs in support of their positions and contentions. The request was granted and the briefs have now been submitted for the Court's consideration.

Comment

This action is brought primarily for the recovery of money damages against the individual defendants. After the 1966 amendments to the Federal Rules were adopted, many money damage class

actions developed. Obstacles appeared to the type of litigation when it was held in *Snyder v. Harris*, 394 U.S. 332, that under class diversity theory every plaintiff must present a claim of over $10,000.00, and no aggregation is permissible to gain federal jurisdiction, both for federal question and diversity jurisdiction.

However, if a suit is brought under a specific Federal statute with no jurisdictional amount prerequisite, the $10,000.00 problem is avoided. A claim under the Civil Rights Act does not require a jurisdictional amount but under the doctrine announced in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, the due process of notice becomes the obstacle when individual notice must be sent to all members who can be identified through reasonable effort. It is alleged in plaintiff's complaint that jurisdiction is sought under the Fourteenth Amendment, 42 U.S.C. §§1981, 1983 and 1985, and under *Brown v. Board of Education*, 347 U.S. 483.

Note should be taken of Rule 23(b)(B)(2) which provides that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Plaintiff's complaint includes counts seeking declaratory judgment and injunctive relief.

CAN PLAINTIFF FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS?

The record discloses that defendant Board of Education of USD 501 submitted Interrogatories to plaintiff (Doc. 27) on January 14, 1974. Time to answer these Interrogatories was extended until March 22, 1974 (Doc. 47). Answers to some of the questions submitted were filed March 15, 1974 (Doc. 49).

Among other things, defendant sought information concerning the plaintiff's financial strength to fairly and adequately protect the interests of the class designated by plaintiff, and asked whether any person or organization of any type has undertaken to defray or is obligated for all or any part of any expenses, including legal fees plaintiff might incur, during the course of the lawsuit. Defendant further asked plaintiff to identify specifically other financial resources she had to support the litigation. (See Interrogatory No. 36.)

Plaintiff did not answer these questions, contending the information sought is irrelevant and further that it is "N/A", whatever that may mean.

At the hearing on July 18, 1975, to determine whether the case might be declared a class action, plaintiff made no effort to establish her financial ability or the ability of the class

which she proposed to represent to maintain the expenses of this lawsuit. It might be inferred from the record that plaintiff expected the anticipated legal expenses to be satisfied at the conclusion of the trial through an award of attorney's fees to her counsel.

Whether the provisions of 20 U.S.C.A. §1617, providing for attorneys' fees in certain cases, would apply to this proceeding need not be determined since a prospect of obtaining such an award at this time is speculative and does not suffice to supply the present need for resources.

It must be noted that plaintiff is alleged to be a minor child, ten (now twelve) years of age. She undertakes to maintain this class action by her maternal aunt, guardian and next friend, individually and for all others similarly situated.

Plaintiff made no showing whatsoever to demonstrate that she has resources of any kind available to prosecute this lawsuit.

She alleges that the class includes all black and other minority children who are or who have been students of elementary and junior high schools of USD 501 with a minority enrollment of 40% or more. She claims this class consists of more than 10,000 persons and are black persons who have attended these schools during the last ten years.

Considering that school authorities are required to keep and maintain records of all students enrolled in the different schools in the district, the names and addresses of the projected class members would be easily ascertainable with the aid of a city directory. There has been no showing made that individual notice by mail to each of them is not practical and the Court now finds that such notice is the best notice practicable within the meaning of Rule 23(c)(2).

In order to adequately and fairly represent the interest of the class, if one could be determined from the record before the Court, the plaintiff must sustain the burden of showing that her resources are adequate to pursue this lawsuit to completion, even in the absence of any additional financial contributions from members of the purported class.

It may be fairly inferred from the record that expenses already incurred by plaintiff's counsel at this point in the lawsuit exceeds $1,000.00, that the amount of $1,000.00 for postage alone for notification would be required, not to consider the expense of preparing proper notice. Developing evidence on the merits of this action will be very expensive, and I find that the probable expense of developing acceptable evidence necessary to present the merits of the case would far exceed the amount the plaintiff has at her disposal.

The undertaking to represent so large a group should never be taken lightly

and the Court should allow such representation only where it appears that plaintiff is willing and financially able to carry that burden. The case should not be permitted as a class action in the hope that at some future date the existence of a class will aid plaintiff in carrying the case to the finish, because no one knows whether unidentified members of the class are able or willing to finance the action. Inadequate financing threatens the procedural and substantive interests of all members of the class.

It follows that the plaintiff has not shown her ability to protect adequately the interests of the class she proposes to represent.

PRIOR PENDING ACTION IS
SUPERIOR TO CLASS ACTION
BROUGHT TO OBTAIN DECLARATORY
AND INJUNCTIVE RELIEF

Rule 23(b)(B)(3) provides in substance that the Court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," and that the matters pertinent to the findings include "(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." The actions pending in this Court, *Unified School District No. 501 v. Weinberger*, No. 74-160-C5, and *Brown v. Board of Education*, Civil Action No. T-136, while not technically class actions, are consolidated

actions brought to obtain the identical declaratory and injunctive relief sought by the plaintiff. These actions are already commenced and are pending an early disposition. The motion of plaintiff for determination of a class action as it relates to the Second and Third Counts of her Complaint in which she seeks declaratory and injunctive relief, is therefore DENIED.

COMMON QUESTIONS OF LAW
AND FACT DO NOT PREDOMINATE

The determination that this case may not proceed as a class action on Counts two and three of plaintiff's Complaint because of the pending litigation before the Court in the cases of *Brown v. Board of Education*, 98 F.Supp. 797, reversed and remanded, 344 U.S. 141, 38 A.L.R. 797, and in *Unified School District No. 501 v. Mathews, substituted for Weinberger*, No. 74-160-C5, has been noted.

This leaves for consideration the issue of damages, compensatory and punitive, against the agencies of the state of Kansas and against their individual members.

Much has been written of the 1966 amendment to F.R.Civ.P. 23. Consensus seems to be that it was designed in large measure to fulfill the "historic mission of taking care of the smaller guy." See 70 *Michigan Law Review* 338.

It should be observed that this is not a case in which any claim is made that defendants have profited financially from any misconduct or illegal action. The individual defendants are public servants for the most part elected by a vote of the people and who serve in their elected capacities without compensation. This case is not at all similar to the case involving overcharges for children's library books from which the publishers reaped large profits as in *State v. Harper & Rowe*, 301 F.Supp. 484, as a result of a conspiracy among publishers to exact exorbitant charges for the books. Nor is there involved any element of financial profit or price discrimination frequently found in those cases in which class actions have been held proper. [See list of cases in footnote 13 at 340, *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir.)].

This case presents the problem of manageability. It appears to be a case in which there is likelihood of individual theories or claims.

Some of the variables are obvious. Assuming that discrimination is established, not every prospective member of the projected class attended the same school. Not every child is equally equipped by nature to attain the same proficiency from the best of educational facilities. The grading system in schools is strong evidence of this. Not every student makes passing grades. Few make A's. Not every student has the incentive to do so. Students of the projected class were not exposed to the same teacher, good or bad, nor did they all complete the

junior high school courses offered or even grade school in some instances. A multitude of variations could be developed. It is extremely doubtful if there could be found two students whose schooling and educational opportunities and attainments are identical or whose alleged deprivations were equal. To sustain the numerous and separate claims of the purported class, proof would be necessary by introduction of evidence pertaining to each individual.

Added to this is the fact that some of the individual defendants did not hold their office during all the period for which damages are sought. Some were not in office at any time during which some students might claim damages from them in a class action.

All this compels the conclusion that separate consideration would be required for the more than 10,000 prospective members of the purported class. It is a typical situation in which we find that the damage issues are individual to each member of the class and are so inextricably entangled with common issues that class treatment should be denied. Common core charges of illegal acts on the part of defendants are not sufficient to satisfy the predominant prerequisite where, as in this case, there is imbedded in the whole proceeding substantial issues individual to each member of the class, and the Court so finds.

This is not a case in which a simple question of fact establishes the basis on which the individual damage claims rest

as a matter of course, and only require a computation from established data to support an individual's claim. Assuming that plaintiff would be successful on the liability issue, there still would have to be "X" number of trials on the damage issues, member by member. The amount of damage sought here requires the determination of not one question of fact but a possible 10,000 or more.

The Court must find and determine that the overall and predominating questions presented by plaintiff's claim are questions of fact and while the same questions of fact exist with respect to the claims of any other member of the class, a conclusion as to one member is not common or determinative when the question arises with respect to another member. The predominating questions are individual ones and not common, and the Court so finds.

Under such circumstances, the Court must conclude that a class action sought to be maintained here is not superior to other available methods for the fair and efficient adjudication of the controversy. All alleged claims of the projected class far exceed the jurisdictional limits of the Court, if indeed any particular amount is required. Cf. *Wilcox v. Commerce Bank*, 55 F.R.D. 134, aff. 474 F.2d 336 (10th Cir.).

In 7A *Federal Practice & Procedure, Wright & Miller*, §1778, at 55-56, it is noted that:

> " . . . if the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate. There is a sound basis for this conclusion. Since all members of a Rule 23(b)(3) class who do not exercise their right to be excluded from the action will be bound by the judgment, it is essential that their interests be connected closely. Otherwise, inaction on the part of an absentee, which in many cases will not represent acquiescence, may result in his being bound by a judgment in an action in which his interests were not presented effectively. Moreover, when individual rather than common issues predominate, the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified."

And see *Williams v. Page*, 60 F.R.D. 29; *Stewart v. Wohlgemuth*, 355 F.Supp. 1212; *In re Transit Co.*, 67 F.R.D. 59.

C O N C L U S I O N S

The Court concludes that:

1. Plaintiff's case does not come within the provisions of Rule 23(b)(1) or 23(b)(2), but must be considered under 23(b)(3).

2. Plaintiff has not shown that she, as a representative party, would be able adequately to protect the interests of the class.

3. Plaintiff has failed to show that questions of law or fact common to members of the class predominate over questions affecting only individual members.

4. A class action is not superior to other available methods now being utilized for the fair and efficient adjudication of the controversy involving the purported members of the class.

5. The claims and defenses of the respective parties are not typical of the claims of the class.

6. Plaintiff's request for declaratory and injunctive relief as demanded in Counts 2 and 3 of her Complaint is DENIED for the reason that litigation already commenced on behalf of persons who would constitute the class will determine the issue in controversy.

THE COURT, THEREFORE, DETERMINES AND ORDERS that this action not proceed as a class action.

The case has been ably and well presented to the Court by plaintiff's counsel and no inference to the contrary is to be drawn from the Court's rulings.

Dated at Topeka, Kansas, this 9th day of October, 1975.

/s/ George Templar
Senior Judge, Assigned.

A P P E N D I X " B "

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. T-5430)

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, and Honorable James E. Barrett, Circuit Judges

Fred W. Phelps and Arnold Levin appeared on behalf of the appellants

Murray F. Hardesty, Erle W. Francis, Charles N. Henson, Philip A. Harley, Charles S. Fisher, Jr. and George E. Erickson, Jr. appeared on behalf of the appellees

PER CURIAM

In this appeal, appellant seeks review of the district court's order denying her motion to certify the case as a class action under Rule 23 of the Federal Rules of Civil Procedure. The named plaintiff, a school child, commenced this action against numerous defendants seeking actual and punitive damages, declaratory and injunctive relief stemming from the alleged deprivation of her civil rights. The defendants,it is claimed, have systematically discriminated against plaintiff because of her race, principally in the manner of operation of the Topeka Public Schools.

The named plaintiff seeks $10,000 in actual damages and the same amount in punitive damages and, in addition, $100,000,000 which is to be distributed to the approximately 10,000 members of the prospective class. The class which plaintiff seeks to represent consists of all black or minority children who are now or have, within the past ten years, been students in the elementary or junior high schools in certain areas of Topeka, Kansas. After a hearing, the district denied plaintiff's request that the case proceed as a class action. Plaintiff then sought appellate review.

Thereafter, appellant requested permission of this court, under Rule 5 of the Federal Rules of Appellate Procedure, to pursue an interlocutory appeal as authorized by 28 U.S.C. §1292(b). That request was denied by an order entered on December 16, 1975 in case 75-8107. Appellees have now moved to dismiss the appeal, contending that this court lacks jurisdiction to review the matter because the order appealed from was not a "final order" within the meaning of 28 U.S.C. §1291. Thus, with the case in this posture, we must consider whether the order denying a class action certification under Rule 23 is an appealable order under §1291.

As a general rule, orders denying class status are regarded as interlocutory and not ordinarily reviewable until the entry of a final judgment. Monarch Asphalt Sales v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975). An exception to this rule is found in the "death knell" exception which permits immediate appellate

review in situations where the effect of the district court's refusal to certify a class under Rule 23, if not reviewed, would be tantamount to the death knell of the action. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2nd Cir. 1966).

Appellant vaguely suggests that we should apply the "death knell" exception in this case to obviate the final order requirement of §1291. However, appellant completely fails to show with any degree of specificity how the order appealed from will in any way impair the viability of her individual claim or her ability to pursue it. We believe that appellant has overlooked the accepted view that the death knell exception cannot become operative unless the order appealed from "will, for all practical purposes, terminate the litigation." Eisen v. Carlisle & Jacquelin, supra; Milberg v. Western Pacific Railroad, 443 F.2d 1301, (2nd Cir. 1971); Falk v. Dempsy-Tegler & Co., 472 F.2d 142 (9th Cir. 1972); Ringsby Truck Lines v. United States, 490 F.2d 620 (10th Cir. 1973). At this point in the litigation, it appears that plaintiff's individual claim for money damages in the amount of $20,000 remains viable and will be unaffected by the absence of the proposed class.

In summary, we are compelled to conclude that the death knell exception cannot be applied to the facts of this case. While the appeal must be dismissed for lack of jurisdiction, we of course, express no opinion with respect to the merits of plaintiff's individual claim or any class certification matters which

may be reviewed on appeal after the entry of final judgment.

Accordingly, it is ordered the appellees' motions to dismiss filed on January 5, 1976 and January 9, 1976 be granted and the appeal is dismissed. It is further ordered that the mandate shall issue forthwith.

A P P E N D I X " C "

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

RALPH E. WEST, et al, Plaintiffs, -vs- CAPITOL FEDERAL SAVINGS & LOAN ASSOCIATION, et al, Defendants.	)	Civil Action No. T-5385

ORDER DENYING MOTION OF
DEFENDANTS TO COMPEL DISCOVERY

The factual claims of plaintiffs and the objectives of the action sought to be maintained as a class action is summarized in the order of the Court denying motions of defendants to dismiss. (Doc. 55.)

Defendants took discovery depositions of the plaintiffs prior to the determination of their motion for class action certification. Among other things, defendants inquired of plaintiffs concerning their financial ability to conduct a class action of the propositions indicated by the record. In addition, inquiry was made of the plaintiffs as to their employment arrangements with their attorney. Also, defendants sought

to determine details leading up to the institution of the action on behalf of plaintiffs by their attorneys of record.

The Court has carefully studied the well-prepared and decision-supported brief submitted by defendants and observes that it contains most of the persuasive arguments advanced to Judge Fred Winner, of the United States District Court for the District of Colorado, in an action then pending before him in which he had ordered the disclosure of information which related to plaintiffs' financial ability in that case to maintain an action, including payment of attorney fees and contracts with their attorneys. It was indicated that the information sought was an attempt to police the lawyers' ethics in connection with the solicitation of business from class members. Judge Winner sustained a motion requiring disclosure of information sought by defendants in that case. Judge Winner received instructions from the Court of Appeals in *Sanderson v. Winner*, 507 F. 2d 477, in which the Appellate Court held that the information sought was irrelevant and that no further consideration of defendants' contentions was required.

This Court should not commit the same error noted in the above-cited action, and must, therefore, overrule defendants' motion to compel discovery of information sought in questions certified by the reporter in the depositions of Ralph E. West, Eduardo Ramirez and Marilyn L. Whitmore.

This litigation has been lagging and the Court is prepared to consider the plaintiffs' motion to certify this proceeding as a class action. If parties have anything further to submit to the Court on that issue, it must be presented within the next ten days.

IT IS SO ORDERED

Dated at Topeka, Kansas, this 26th day of March, 1976.

/s/ George Templar
Senior Judge, Assigned.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1759

FILED
JUN 28 1976
MICHAEL RODAK, JR., CLERK

EVELYN RENE JOHNSON, a minor aged ten years, by MARLENE MILLER, *Petitioner*,

vs.

C. TAYLOR WHITTIER, individually and as Kansas Commissioner of Education, KANSAS STATE BOARD OF EDUCATION, JOHN W. FRAZIER, PAUL J. JONES, DOROTHY BALLARD, DOROTHY G. GROESBECK, HAROLD H. CRIST, THOMAS J. PITNER, WILLIAM T. BILLINGSLEY, HARRY O. LYTLE, JR., CARL M. WILSON and ERVIN E. GRANT, each individually and as members of Kansas State Board of Education, BOARD OF EDUCATION OF TOPEKA UNIFIED SCHOOL DISTRICT 501, MARK L. MORRIS, JR., ROBERT R. SCHENDEL, GORDON SOMMERS, FRED W. RAUSCH, JR., CONSTANCE L. MENNINGER, HARRY W. CRAIG, JR., R. G. SWENSON, WAYNE T. STRATTON and T. C. ANDERSON, et al., *Respondents*.

UNIFIED SCHOOL DISTRICT #501, AND ITS INDIVIDUAL MEMBERS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES S. FISHER, JR.
ROBERT D. OCHS OF
FISHER, RALSTON & OCHS
1400 Topeka Boulevard
Topeka, Kansas

GEORGE E. ERICKSON, JR.
420 West 33rd Street
Topeka, Kansas
CHARLES N. HENSON
1300 Merchants Bank Building
Topeka, Kansas

Attorneys for Respondent Unified School District #501 and Members

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1759

EVELYN RENE JOHNSON, a minor aged ten years, by MARLENE MILLER, *Petitioner*,

vs.

C. TAYLOR WHITTIER, individually and as Kansas Commissioner of Education, KANSAS STATE BOARD OF EDUCATION, JOHN W. FRAZIER, PAUL J. JONES, DOROTHY BALLARD, DOROTHY G. GROESBECK, HAROLD H. CRIST, THOMAS J. PITNER, WILLIAM T. BILLINGSLEY, HARRY O. LYTLE, JR., CARL M. WILSON and ERVIN E. GRANT, each individually and as members of Kansas State Board of Education, BOARD OF EDUCATION OF TOPEKA UNIFIED SCHOOL DISTRICT 501, MARK L. MORRIS, JR., ROBERT R. SCHENDEL, GORDON SOMMERS, FRED W. RAUSCH, JR., CONSTANCE L. MENNINGER, HARRY W. CRAIG, JR., R. G. SWENSON, WAYNE T. STRATTON and T. C. ANDERSON, et al., *Respondents*.

UNIFIED SCHOOL DISTRICT #501, AND ITS INDIVIDUAL MEMBERS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Respondent, Unified School District #501, and its individual members, prays that a Writ of Certiorari not issue in this matter and files its Brief in opposition to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioner in this matter has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1) by requesting that a writ of certiorari issue upon the petition.

QUESTIONS PRESENTED

Petitioner's Statement of the Question presented omits factors important to a proper appreciation of the case. The Question would be more completely put as follows:

Where a fifth grade student bring a class action on behalf of all black elementary and junior high school students now attending, or who have attended, schools withn a vaguely defined geographic portion of a school district over a period of 10 years, for actual and punitive damages and declaratory injunctive relief as the result of receiving allegedly inferior educations, is the denial of class certification an appealable order where the named Plaintiff is allowed to proceed with her individual claim for $20,000.00; where the Plaintiff introduced no evidence to suggest that her own $20,000.00 claim was not a viable one absent class certification?

STATEMENT OF THE CASE

Petitioners seek $100,000,000.00 actual and $100,000,000.00 punitive damages together with declaratory-injunctive relief on behalf of 10,000 present and former black elementary and junior high school students who have attended vaguely defined geographic areas of Unified School District #501 (USD 501). The District is approximately congruent with the city limits of the City of Topeka, Kansas. Plaintiff's individual claim is for $20,000.00.

This Brief in Opposition to the Petition for Writ of Certiorari is presented on behalf of USD 501 and its individual, popularly elected, non-salaried Board Members. Other defendants are the Kansas Commissioner of Education, the Kansas State Board of Education, and its individual members. The Secretary of the Department of Health, Education and Welfare was dismissed as a party.

The thrust of Petitioner's claim in the Complaint is that over a period of ten years each of the 10,000 members of her alleged class have received an inferior education, worth $10,000 less than the education received by black, white, and other children attending schools in other areas of the district, and each class member is entitled to $10,000 actual and $10,000 punitive damages. Petitioner also seeks declaratory relief and an injunction to change procedures of District Schools. The Petitioner makes no distinction as to children attending particular schools for differing number of years and no charge is made that white children in the schools Plaintiff complained of have experienced deprivation.

All defendants are alleged to be personally responsible without any distinction made or regard shown to when or how long the named individuals served in office.

Petitioner refers to *Brown* v. *Board of Education of Topeka,* 349 U.S. 294 (1954) as authority for the instant litigation. That case was remanded to the United States District Court for the District of Kansas for implementation of the decision. In accordance with Orders of this Court, the United States District Court for the District of Kansas, sitting as a three judge Court, in *Brown* v. *Board of Education of Topeka,* Civil Action T-136, required a plan of school district operation to be prepared. A plan was submitted and approved by that three-judge Court on Oc-

tober 28, 1955. See 39 F. Supp. 468. However, of significance to this action is the fact that jurisdiction of school district operations was retained by the Court and continues to this day. Thus, the school district operations complained of by the Petitioner have been under the retained jurisdiction of the District Court during the entirety of the ten year period in issue. Otherwise, this litigation has no connection with *Brown*.

It should also be noted by this Court that after the Petitioner's Motion for Determination of a Class Action was filed, a lengthy hearing was held at which Petitioner presented extensive citations of authority and argument and was afforded the opportunity to put on evidence in support of a class action. The Petitioner was additionally afforded the opportunity to put on evidence to suggest her individual $20,000 claim was not viable absent class certification. However, the Petitioner presented no such evidence.

The District Court for the District of Kansas denied class action certification but did certify its Order of Denial for Review by the Tenth Circuit Court of Appeals under 28 U.S.C. §1292(b). The Plaintiff improvidently attempted an appeal of right under 28 U.S.C. §1291.

The Court of Appeals for the Tenth Circuit declined the discretionary appeal, and sustained this Respondent's Motion to Dismiss the Appeal under 28 U.S.C. §1291 for the reason that the denial of class certification did not constitute a final, appealable order. (Petition, App. "B")

The Respondent herewith submits the correctness of that ruling by the Tenth Circuit Court of Appeals and also offers herewith its arguments and reasons why the Writ of Certiorari should not issue.

ARGUMENT AND AUTHORITIES IN SUPPORT OF DENIAL OF THE WRIT OF CERTIORARI

The wisdom of the District Court denying class action certification should not be a point of concern in the appeal. The only question for determination is whether that order, for whatever reason, may be tested at this stage of the litigation.

That is to say, under 28 U.S.C. §1291 an appeal lies only from a final order. This Court has always chosen to test the "finality" of an order by practical rather than technical construction. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Consequently, can this litigant, now, at this stage of the proceedings, appeal the order denying class certification under U.S.C. §1291?

As a general rule, orders denying class status are regarded as interlocutory and not ordinarily reviewable until the entry of final judgment. *Monarch Asphalt Sales* v. *Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975). Petitioner in this matter urges this Court to allow denials of class action certification to be appealable as a matter of right or, in the alternative, to allow a virtually unlimited application of the "death knell" doctrine as an exception to the general rule. Neither request should be sustained.

To allow a petitioner the unlimited right to appeal the denial of class action certification as a matter of right would be tantamount to a repeal of the final judgment rule embodied in U.S.C. §1291. At the very least, such a ruling would run directly contrary to the final judgment rule embodied in 28 U.S.C. §1291 and the sound reasons upon which it is predicated. The final judgment rule also has jurisprudential significance far beyond mere technicalities

and should be viewed and applied as an authoritative application and implementation of the basic and persisting policy against piecemeal appeals. The purpose of this section (U.S.C. §1291) is to combine in one review all stages of the proceedings that effectively may be reviewed and corrected if and when final judgment results.

The rules presently extant governing the appealability of class action orders are no different—and should be no different than those applicable to civil actions generally. To be appealable, an order must be either a final judgment or within one of the exceptions to the final judgment rule. This rule limits appellate jurisdiction to final decisions of the district courts and is intended to conserve judicial resources by preventing piecemeal review of interlocutory rulings which arise during the course of a lawsuit. See *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940); and *Catlin* v. *United States*, 324 U.S. 229, 233-34 (1945). Such appeals would generate constant interruptions of trials and delays in terminating a case, and increase the potential for harassment of one party by another. See *American Express Warehousing Ltd.* v. *Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967). Tentative, incomplete or informal decisions should not be immediately reviewed since such decisions are subject to change and subsequent action by the trial court might render appellate review futile or moot. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Traditionally, this Court has viewed a final decision as one which ends the litigation on the merits and leaves nothing for the Court to do but execute on the judgment. See *Catlin* v. *United States, supra; St. Louis & Southern Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24 (1883); and *Bostwick* v. *Binkerhoff*, 106 U.S. 3 (1882).

The Respondents would submit that the Petitioner does not have a "final order" for this Court to review. Appellate consideration of this order must be deferred until the whole cause is litigated and this Petitioner's request should be denied.

A limited exception to the final judgment rule was recognized in *Eisen* v. *Carlisle & Jacquelin* (*Eisen I*), 417 U.S. 156 (1973). Following *Cohen*, the Court recognized that a denial of certification provides finality from a practical standpoint where Plaintiff was left with only his individual $70.00 claim. The Court thus concluded that "where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." *Eisen, supra;* at page 162.

Consequently, all this Court must do is to ask the question of whether, as a matter of law, *with no record evidence furnished by Plaintiff,* who still has an individual claim of $20,000; can the Plaintiff invoke this exception? We would submit that no such determination is warranted.

Plaintiff's Petition urges as reasons why a writ should issue, various arguments to the effect that error was allegedly committed by the District Court in denying class certification. Her authorities are basically those involved with the merits of certification and not the appealability of a class certification determination. See e.g., *Esplin* v. *Hirsch*, 402 F.2d 94 (10th Cir. 1968), cert. den., 394 U.S. 928 (1960) (Pet. p. 5), which had nothing to do with the pre-judgment appealability of a class certification denial. See also *Halverson* v. *Convenient Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972), where the case was dismissed because of what the District Court believed was solicitation by Plaintiff's counsel.

The question is not whether the order was correct, but whether it is appealable.

Cohen, supra, and *Eisen, supra,* stand for the proposition that if, because of practicalities, a litigant will never have a chance to test error absent immediate appeal, the class question is appealable before final judgment. Otherwise, it is not. This Court can hardly arbitrarily fix, for all cases, a dollar value on "appealability" in class actions. *But,* we submit that if a $20,000 individual claim, as is present in this case, is not at least presumptively viable on its face, absent clear proof to the contrary, virtually all class determinations will be automatically appealable.

Since the Petition argues the merits of certification denial and not its appealability, there is no useful purpose to be served in extended commentary on Plaintiff's authorities. However, one case cited by Plaintiff is worthy of comment. Plaintiff cites *Gosa* v. *Securities Investment Company,* 449 F.2d 1330 (5th Cir. 1971) (Pet. pp. 6, 7) as a source of factors to be considered in determining the tolling of the "death knell." That case involved denial of class certification and dismissal of an appeal for lack of jurisdiction, as in the instant case.

The Fifth Circuit Court pointed out on page 1332 of 449 F.2d that:

> "We would have to engage in rank speculation if we were to undertake the determination of such matters as: . . . [anticipated expenses, solvency of the named party and other financial considerations.]
>
> * * *
>
> If the plaintiff wished to assert that what was otherwise a purely interlocutory ruling was efficiently converted by the practical circumstances of the matter to

> an extinction of the very right to litigate, the plaintiff had the burden of developing these facts before the trial forum, which could afford an opportunity for adversary rebuttal and could enter findings and conclusions on this issue. Such a post-ruling hearing elimiates the procedural deficiency of requiring this Court to speculate without the benefit of relevant record facts or a decision on the real issues presented."
>
> * * *
>
> (fn. 2, p. 1333—"However, the Record indicates no attempt at this hearing by appellant to present evidence other than conclusory assertions to the inability of his client to proceed individually.")

As in the instant case, the *Gosa* plaintiff introduced no record evidence of practical finality, and merely argued vaguely with the apparent hope that rhetoric might supply what the transcript lacked.

Further, the respondents would suggest to this Court the case of *Ott* v. *Speedwriting Publishing Company,* 518 F.2d 1143 (6th Cir. 1975). In that case class action status was denied by the United States District Court and the Plaintiffs appealed to the Sixth Circuit Court of Appeals. That Court, following the reasoning of the Fifth Circuit Court in *Gosa,* stated as follows in language directly applicable to the instant case on page 1149 of 518 F.2d:

> "We conclude that although the reference to death knell originated in *Eisen I,* it is but one concrete application of an exception to the rule of finality which has been recognized by the Supreme Court at least since its decision in *Cobbledick* v. *United States, supra.* In *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), the Supreme Court approved the action of this court in deciding a case on

appeal from an order striking portions of a complaint. It noted that previous departures from the requirement of finality had been approved in cases where a ruling was 'fundamental to the further conduct of the case.' *Id.* at 153, 85 S.Ct. at 311. The Court referred to the necessity recognized in *Dickinson* v. *Petroleum Conversion Corp., supra,* to balance the competing considerations of 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' 338 U.S. at 511, 70 S.Ct. at 324 (footnote omitted). We hold that the death knell doctrine is a legitimate expression of a well supported exception to the requirement of finality. Its application must depend, however, upon a balancing of the competing considerations described by the Supreme Court. *Such a balancing can only be based on the record before the appellate court. Thus, we adopt the rule of the Fifth Circuit that no order denying class action certification may be appealed to this court unless the appealing party develops a factual record in the district court from which the District Judge may make findings on the issue of whether, for all practical purposes, the order from which the appeal is sought actually extinguishes the litigation. Gosa* v. *Securities Investment Co., supra.* The district court may dispense with this requirement in cases where it takes judicial notice that the amount involved is so small that it is obviously unfeasible for an individual plaintiff to continue the litigation without class action status. . . . In the interest of judicial economy, however, and noting that the plaintiff's total damages of $30 make this a case where further individual litigation may be presumed to be impracticable, we will proceed to decide the appeal which has been briefed

and argued before us rather than remanding for findings by the district court. *Gillespie* v. *United States Steel Corp., supra* . . ."

In this instant case now before this Court, the Plaintiff was given the opportunity to present evidence and to make an evidentiary record, but she failed to do so. Consequently, there can be no balancing of the "competing considerations" unless there is a factual record upon which this Court can rely. The Plaintiff has not supplied the Court with that record.

However, we would urge on this Court that it can take judicial notice of the fact that the Plaintiff does have her own $20,000 claim (double the jurisdictional limit) still pending. That claim, in and of itself, should be sufficient to negative any indication that the "death knell" has sounded—even in the absence of an evidentiary record. The instant case is easily distinguished from the situations in *Eisen, supra,* and *Ott, supra,* wherein there were remaining claims for $70 and $30 respectively.

In two cases consolidated under the title of *Korn* v. *Franchard Corp.,* 433 F.2d 1301 (2d Cir. 1971) the Court decided that Mrs. Korn's suit for violations of the federal securities law "will go no further without class suit designation." (433 F.2d at 1306) Because Mrs. Korn's loss amounted to $386, the Second Circuit denied a motion to dismiss an appeal denying a class action certification. *However,* in the companion case the actual claims of the representative were for about $8,500. The Court concluded:

> ". . . That figure is close enough to the federal jurisdictional minimum for certain types of cases to suggest it is sufficient incentive to keep the case alive." (433 F.2d at 1306-07)

Accordingly, the "death knell" doctrine was not appropriate in that case—and it is not appropriate in this case.

Further, the Plaintiff vaguely argues (Pet. pp. 5 and 6) that her costs will be "great," and ". . . there can be no doubt that the expenses involved in prosecuting this litigation require class action certification . . ." (Pet. p. 7) However, that is only argument, and it should be noted it is highly inconsistent with her prior assurances to the District Court that she could represent the class. Certainly the costs should be less for her individual claim. The Respondent fails to see the logic in her assertions that she can effectively represent 10,000 people, to all of whom she must give notice, but she cannot economically pursue her own $20,000 claim.

Plaintiff urges this Court to adopt the reasoning and rationale of *Bell* v. *Beneficial Consumer Discount Company*, 348 A.2d 734 (1975), to the effect that under Pennsylvania state practice all class determinations are appealable. The *Bell* Court recognized differences between the state and federal rules, but the Plaintiff was careful not to explore them.

In urging the adoption of the *Bell* rationale, Plaintiff does not show to the Court that if *Bell* is adopted, continued revision of class determinations during the course of litigation allowed by Rule 23 of the Federal Rules of Civil Procedure, would presumably make all those orders appealable of right. That is what the logic of *Bell* calls for and what litigants will keenly grasp if such a decision is made.

The absolute rule adopted by the Pennsylvania Court is fraught with difficulty. If this Court adopts that rule, the result could very well be that *all* preliminary orders

or decisions respecting class certification (whether for or against class certification, establishing notice requirements, modifying the class, designating sub-classes, etc.), will be subject to full appellate review at any stage of the litigation. Thus, a decision made on the eve of trial to constrict the class and establish sub-classes or expand notice would be immediately reviewable.

Plaintiff suggests to this Court what other writers have suggested. See Note, *Interlocutory Appeals from Orders Striking Class Action Allegations*, 70 Colum. L.Rev. 1292 (1970); and *Class Action Certification Orders: An Argument for the Defendants' Right to Appeal*, 42 George Washington L.Rev. 621. However, they do not sit on Federal Appellate tribunals.

If *Bell, supra,* is embraced by this Court, litigants will quickly assert that many other heretofore interlocutory orders are just as important as an order controlling the progress of a class action and should be appealable also. The *Bell, supra,* approach is commendable only for its simplicity. The *Cohen, supra,* and *Eisen, supra,* reasoning goes a lot further toward weighing all aspects of the appellate process and gives meaning to the finality requirements imposed by Congress in 28 U.S.C. §1291; while at the same time recognizing that, *upon a proper record showing and consideration of practicalities,* some certification denials may be final and appealable.

The *Cohen, supra,* and *Eisen, supra,* cases make us resort to reason, while *Bell, supra,* represents a denial of finality requirements.

Plaintiff (Pet. p. 9) states the writ should be allowed because the Tenth Circuit decision (App. "B") conflicts with the Second and Sixth Circuits and the Tenth Circuit has, in the instant case, decided a question not yet settled by this Court. We are not favored with a statement of

what the conflict between the Circuits is or what cases evidence that conflict. Neither are we favored with an explanation of what the Tenth Circuit has decided that this Court should review. We know that the Second, Sixth and Tenth Circuits are all bound to follow *Eisen, supra,* and the Tenth Circuit did so in this case. (Pet. App. "B" p. 2) See *Caceres* v. *International Air Transport Assoc.,* 422 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295 (2d Cir. 1969); *Shayne* v. *Madison Square Garden Corp.,* 491 F.2d 397 (2d Cir. 1974); *Mulberg* v. *Western Pacific Railroad,* 443 F.2d 1301 (2d Cir. 1971); *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977; *Walsh* v. *City of Detroit,* 412 F.2d 226 (6th Cir. 1969); *Ott* v. *Speedwriting Publishing Co. supra* (6th Cir. 1975); *Monarch Asphalt Sales* v. *Wilshire Oil Co.,* 511 F.2d 1073 (10th Cir. 1975); and *Ringsby Truck Lines* v. *United States,* 490 F.2d 620 (10th Cir. 1973).

The Tenth Circuit Court was bound to follow *Eisen, supra,* not *Bell, supra. Eisen, supra,* holds that the order is not final and is not appealable unless the "death knell" exception applied. The Tenth Circuit Court notes in their opinion that:

> "Appellant vaguely suggests that we should apply the 'death knell' exception in this case to obviate the final order requirement of §1291. However, appellant completely fails to show with any degree of specificity how the order appealed from will in any way impair the viability of her individual claim or her ability to pursue it.
>
> * * *
>
> At this point in the litigation, it appears that plaintiff's individual claim for money damages in the amount of $20,000 remains viable and will be unaffected by the absence of the proposed class." (Pet. App. "B", p. 2)

Plaintiff made no attempt to present the District Court any evidence that her individual claim was not viable. The Tenth Circuit Court, accordingly, had no possible basis for rendering a decision other than the one it did. This Court, likewise, has no record upon which to find any conceivable impairment of Plaintiff's individual claim and indeed has a contrary indication with her pending $20,000 claim. Without some record evidence of impairment, the "death knell" should not become an issue.

Plaintiff's Petition fails to come to grips with the issue before this Court and erroneously assumes that the correct approach is to urge reversal of the District Court for some alleged error. She is here only for the very limited purpose of urging this Court to decide whether the District Court could be reviewed at all, at this stage of the litigation. Her Petition, however, is almost entirely devoted to the reasons for her dissatisfaction with the District Court order and order of the Tenth Circuit Court. Her efforts would be better directed toward the rule enunciated in *Eisen, supra.* There is no showing of "practical" finality and the writ should not be allowed.

CONCLUSION

Rule 19(1)(b) of this Court clearly sets forth the criteria governing the grant of a Writ of Certiorari. Clearly, the Tenth Circuit Court has not "rendered a decision in conflict with the decision of another Court of Appeals on the same matter." More to the point, the Tenth Circuit Court faithfully adhered to the mandate of this Court in *Eisen, supra.* Plaintiff made no showing that her $20,000 individual claim was not viable and it is inconceivable that such a showing could be made.

The posture of the instant case on appeal precisely parallels that of *Gosa, supra,* and *Ott, supra.* Since Petitioner did not introduce evidence below to show for all practical purposes the order from which the appeal is sought actually extinguishes the litigation, there would be nothing on which this Court could base its "necessarily *ad hoc* determination." An individual claim may be so small that the unfeasibility of litigation by the individual plaintiff is clear without any further showing. *However,* the claim in this case is relatively large (twice the jurisdictional limit). In *Gosa, supra,* a claim for $3,322.20 was not so small as to call for the application of the death knell exception without any further showing; *a fortiori* the Petitioner's claim here of $20,000, standing alone, is not small enough to show the unfeasibility for this individual Plaintiff of litigating her claim to the final adjudication in the District Court.

Congress has determined in its wisdom, and we think it is indeed wise, that some orders merely regulating the process of litigation can be better left to the unreviewable discretion of the District Court rather than become the subject of appeal—and we think this is just such a case.

Finally, the Petitioner has not suggested to this Court any persuasive authority or compelling reasons why it should at the present time rethink its position or reconsider the precedents and augment the rising number of appeals. The unprecedented number of appeals can only detract from the speedy resolution of admittedly appealable cases and questions. See Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L.Rev. 542 (1969).

We do not believe that either jurisdictional ground suggested by Petitioner in the Petition has been sub-

stantiated by Petitioner and at the present time the Court should allow this case to take its normal course in the District Court. No useful purpose could be served by allowing the writ and it should be denied.

WHEREFORE, the Respondent respectfully requests this Court to enter an order denying the Writ of Certiorari.

Respectfully submitted,

CHARLES S. FISHER, JR.
ROBERT D. OCHS of
FISHER, RALSTON & OCHS
1400 Topeka Boulevard
Topeka, Kansas

GEORGE E. ERICKSON, JR.
420 West 33rd Street
Topeka, Kansas

CHARLES N. HENSON
1200 Merchants Bank Building
Topeka, Kansas

Attorneys for Respondent Unified School District #501 and Members